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Cheree L. B. Stevens

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PRICE HENEVELD COOPER DEWITT & LITTON, LLP
695 KENMOOR, S.E.
P O BOX 2567
GRAND RAPIDS, MI 49501

EXAMINER

BEKKER, KELLY JO

ART UNIT

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/629,991	Applicant(s) STEVENS ET AL.	
	Examiner Kelly Bekker	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 September 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-23 and 35-49 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-23 and 35-49 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Amendments made 9/3/08 have been entered.
Claims 1-23 and 35-49 remain pending.

Claim Rejections - 35 USC § 112 2nd Paragraph

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

The rejection of claims 11-13 and 43-47 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention has been withdrawn in light of applicant's amendments and arguments made September 3, 2008. Specifically, the rejection of claim 11 due to the recitation, "The composition of claim 7, where the film-forming agent comprises dextrin" has been withdrawn in light of applicant's amendments made September 3, 2008 and the rejection of claim 43 due to the recitation, "The composition of claim 17, where the coating composition provides a moisture barrier where the coating composition is applied to the pastry product " has been withdrawn in light of applicant's arguments, remarks page 8 paragraph 2, made September 3, 2008.

Claim 16 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 16 recites the limitation "coated toaster pastry" in claim 1. There is insufficient antecedent basis for this limitation in the claim. Claim 1 recites a "pastry" product, however does not recite a "coated toaster pastry", thus it is unclear as to if the pastry recited in claim 16 is the same pastry as recited in claim 1 or some other pastry product.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The rejection of claims 1-9, 11, 14-19, 22, 23, and 43-45 under 35 U.S.C. 103(a) as being unpatentable over Bauer (US 2341523) in view of Hodge (US 3723132) has been withdrawn in light of applicant's arguments made September 3, 2008. Specifically applicant's argument that one would not have been motivated to add a food coating, such as taught by Bauer, that includes sodium diacetate (which was known to have a vinegar flavor) to a pastry product is convincing (Remarks pages 8-9).

The rejection of claims 10, 20, and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer (US 2341523) in view of Hodge (US 3723132), further in view of Gonzalez-Sanz (US 5439697) has been withdrawn in light of applicant's arguments made September 3, 2008. Specifically applicant's argument that one would not have been motivated to add a food coating, such as taught by Bauer, that includes sodium diacetate (which was known to have a vinegar flavor) to a pastry product is convincing (Remarks pages 8-9).

The rejection of claims 12 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer (US 2341523) in view of Hodge (US 3723132), further in view of Lenchin et al. (US 4510166) has been withdrawn in light of applicant's arguments made September 3, 2008. Specifically applicant's argument that one would not have been motivated to add a food coating, such as taught by Bauer, that includes sodium diacetate (which was known to have a vinegar flavor) to a pastry product is convincing (Remarks pages 8-9).

The rejection of claims 21 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer (US 2341523) in view of the combination of Hodge (US 3723132) and Gonzalez-Sanz (US 5439697), further in view of Lenchin et al. (US 4510166) has been withdrawn in light of applicant's arguments made September 3, 2008. Specifically applicant's argument that one would not have been motivated to add a food coating, such as taught by Bauer, that includes sodium diacetate (which was known to have a vinegar flavor) to a pastry product is convincing (Remarks pages 8-9).

The rejection of claims 17 and 22 under 35 U.S.C. 103(a) as being unpatentable over Hodge (US 3723132) and in view of Baur et al. (WO 94/21143) has been withdrawn in light of applicant's amendments and arguments made September 3, 2008.

The rejection of claims 35-42, 48, 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer (US 2341523) in view of Hodge (US 3723132), further in view of the combination of Baur et al. (WO 94/21143) and Gonzalez-Sanz (US 5439697) has been withdrawn in light of applicant's amendments and arguments made September 3, 2008.

Note: Roskam (US2003/0044488 A1) qualifies for 103(a) as a 102(a) reference. Applicant does not have priority of provisional application 60/417,295 for the instantly claimed invention. The provisional application does not disclose several of the instantly claimed features, such as an edible substrate derived at least partially from wheat, a low or high solubility dextrin in the coating composition, a percentage range, such as 2-100% starch in the composition, a percentage range, such as 20-40%, of corn dextrin in the composition, the coating as providing a partial moisture barrier, ect. For example, all of the independent claims recite a wheat based substrate, which is not disclosed in the provisional application. It is further noted that the following rejections were previously presented in the office action mailed June 4, 2007 and then were improperly withdrawn in light of 103(c) argument. Although the reference no longer qualifies for a 103(a) rejection as a 102(e) reference, as disqualified by applicant's 103(c), the reference qualifies for a 103(a) rejection as a 102(a) reference.

Claims 1-23, 35-38, 41, and 43-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roskam et al. (US 2003/0044488 A1) in view of Lenchin et al (US 4510166).

Roskam teaches of a composition comprising a pastry product at least partially coated with a substantially clear (i.e. transparent) coating composition comprises a oxidized wheat starch component (i.e. a modified starch component) wherein the coating composition provides at least a partial moisture barrier on the pastry product,

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wherein the pastry product is low moisture content dough and comprises wheat flour. Roskam teaches that the pick up for the coating composition is applied as slurry, and that the slurry composition includes 32-48% solids. Roskam teaches that the coating composition includes 50-100% starch, 4-20% dextrin (i.e. a film former), 0.1-0.3% stabilizers including xanthan gum, 11% sugar, i.e. granulated sugar, and 0.1-3% leavening agents comprising 0.1-3% sodium acid pyrophosphate and/or 0.1-3% sodium bicarbonate. Roskam teaches that the slurry composition pick up can vary depending on the substrate material. Roskam teaches that the slurry pickup is 25-35% for baked goods, including toaster pastries. Roskam teaches that the slurry composition has a Strain viscosity of about 4-20 seconds. Specifically regarding the coating composition as applied at a temperature from about 40-100F, Roskam teaches of applying the coating to a substrate without additional heating or cooling, thus it would be inherent that Roskam teaches of applying the coating at about 70F (i.e. room temperature). Refer specifically to Abstract, Paragraphs 0002, 0013-0015, 0020-0023, 0026-0028, 0034-0036, and 0040-0044. Roskam teaches that the coating acts as moisture barrier where applied to the substrate upon thermal processing (paragraphs 0015, 0026, and 0036).

Roskam is silent to the type of dextrin in the coating composition as recited in claims 1, 11, 12, 13, 17, 21, 35, 36, 38, and 47, and to up to about 32% dextrin as recited in claim 38.

Regarding the dextrin as corn dextrin that is low solubility of less than about 15% in 77F water, Lenchin teaches that corn dextrin provides a suitable type of dextrin to use when producing coating compositions (Abstract and Column 4 lines 53-54). Roskam teaches that dextrin is utilized to modify the texture and tensile of the final coated product (paragraphs 0034 and 0035). Since Roskam teaches of using a dextrin in a coating composition, does not teach what type of dextrin to utilize, one would have been motivated to look to the coating art, such as Lenchin, to determine what type of dextrin to utilize in the coating. One would have been motivated to use corn dextrin as the dextrin coating as taught by Roskam because Lenchin teaches that corn dextrin is a suitable type of dextrin to use in coating compositions. One would have been further

motivated to chose a solubility level corn dextrin depending on the desired texture and tensile strength of the final product.

Regarding up to about 32% dextrin as recited in claim 38 Roskam teaches, in one embodiment that up to 20% dextrin is utilized in the coating composition. Roskam teaches that more dextrin is utilized if a crunchier texture and reduce breakage (i.e. increased tensile strength) is desirable (paragraphs 0034 and 0035). Thus, depending on the thickness of the pastry product and the desired crunchiness of the pastry, one of ordinary skill in the art at the time the invention was made would have been motivated to modify the amount of dextrin in the coating composition. One of ordinary skill in the art at the time the invention was made would have been further motivated to increase the amount of dextrin in the coating composition in order to produce a crunchier pastry product that was stronger (i.e. do not break easily, such as during transportation).

Claims 39, 40, 42, and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roskam in view of Lenchin et al (US 4510166), further in view of Fennema ed. (Food Chemistry 3rd Edition).

Roskam teaches of a pastry product with a substantially clear partial moisture barrier coating containing modified food starch, as discussed above. Roskam is silent to the substitution level of the modified food starch as recited in claims 39, 40, and 49.

Fennema teaches that modified starch usually has a substitution level of less than 0.1 and generally within the range of 0.002-0.2 (Page 201 Section 4.4.9 Paragraph 3). Fennema teaches that starches are modified to improve their behavioral characteristics (Page 201 Section 4.4.9 Paragraph 1).

Since, Roskam does teaches of a modified starch but does not teach of the substitution level of the starch, one of ordinary skill in the art would have been motivated to look to the food art, such as Fennema, to find the starch substitution level. One would have been further motivated to use starch with a substitution level of 0.002-0.2 since it was commonly utilized in foods and would be readily available.

Claims 1-11, 14-20, 22, 23, and 43-46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lazard et al. (EP 0547551 A1) in view of Tsen et al (US 3773521).

Lazard et al (Lazard) teaches of a composition including pastry products (page 3 lines 41-45) at least partially coated with a substantially clear, i.e. invisible, coating composition (page 9 lines 19-22) comprising a modified oxidized wheat starch (page 7 lines 18-37) and a film forming agent comprising corn dextrin (page 6 line 56 through page 7 line 8 and Table III), wherein the composition provides a moisture barrier on the pastry product where applied (abstract). Lazard teaches that the coating composition is a slurry with 5-40% water and thus 60-95% solids (abstract). Lazard teaches that the coating composition contains 5-40% modified starch component (abstract), 0-5% stabilizers, 0-5% acids and bases, i.e. leavening agents, 0-5% flavorants (page 5 lines 11-16), and 20% corn dextrin (table XII). Lazard teaches that the coating thickness is adjust to produce the coating with the desired strength and handling characteristics (page 9 lines 8-18). Lazard teaches that the coating is thermally processed, at about 90C, to form a moisture barrier and applied to the pastry composition, which is at room temperature, i.e. about 70F (page 8 line 56 though page 9 line 2). Note: Lazard does not specifically teach of sweeteners, sodium acid pyrophosphate (SAP), and sodium bicarbonate, thus teaching of 0% sweeteners, 0% sodium acid pyrophosphate (SAP), and 0% sodium bicarbonate.

Lazard is silent to the pastry product as comprising wheat flour as recited in claims 1 and 17, to the pastry product as a low moisture content dough as recited in claim 3, to the coating composition as comprising granulated sugar as recited in claims 15 and 23, and to the slurry pick up on the pastry as recited in claims 16

Tsen et al (Tsen) teaches that wheat flour based breads, baked or fired foods are staple foods in many countries because of their relatively high caloric value, ready availability of wheat flour at an economical price, and attractive organoleptic and appearance properties of the food products (Column 1 lines 20-25).

Regarding the pastry product as comprising wheat flour, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the

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pastry product to comprise particular ingredients depending on the final product desired. For example, one would have been motivated for the pastry product to comprise wheat flour in order to produce a high caloric product. It would have been further obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise wheat flour since it is readily available at an economical price, and has attractive organoleptic and appearance properties when used in food products, as taught by Tsen.

Regarding the pastry product as low moisture content dough, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to be of low or high moisture dough depending on the final product desired. For example, one would have been motivated to use a low moisture dough product in order to have a drier more crunchy final product. Both low and high moisture content dough were well known at the time the invention was made and to choose one or the other for the pastry product of Lazard would be within the routine determination of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims.

Regarding the coating composition as containing granular sugar, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use a desired flavoring in the coating composition as taught by Lazard. One would have been motivated to use the well known flavorant, granular sugar, in the coating composition in order to impart a sweet flavor. To adjust the sweetness of a food product by adding granular sugar was well known and would be routine determination of one of ordinary skill in the art at the time the invention was made.

Regarding the slurry pick up on the toaster pastry, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry coating to be of a thickness, and thus to have a specific pick up, depending on the properties desired in the final coating, as taught by Lazard. To adjust the thickness and pick up of the coating composition would be routine determination of one of ordinary skill in the art at the time the invention was made, as taught by Lazard, and would not impart a

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patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Claims 12, 13, 21, and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lazard et al. (EP 0547551 A1) in view of Tsen et al (US 3773521), further in view of Lenchin et al. (US 4510166).

Lazard teaches of a composition including pastry products at least partially coated with a moisture barrier as discussed above. Lazard teaches that dextrin is used, such as disclosed in Lenchin et al, US 4510166 (page 7 lines 7-8). Lazard is silent to the solubility level of the corn dextrin as recited in claims 12, 13, 21, and 47.

Lenchin et al. (Lenchin) teaches of converted starches in coating compositions (abstract and Column 8 lines 21 and 26-34). Lenchin teaches that the coating strength and texture are a result of the solids and thus solubility level of the starch (Table II).

Regarding the solubility level of the corn dextrin, it would have been obvious to one of ordinary skill in the art at the time the invention was made to adjust the solubility level of the corn dextrin depending on the coating strength and texture desired as taught by Lenchin. To do so would not impart a patentable distinction to the claims as it was within the routine determination and ordinary ingenuity of one of ordinary skill in the art as taught by Lenchin.

Claims 35-38, 41, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lazard et al. (EP 0547551 A1) in view of the combination of Tsen et al (US 3773521) and Baur et al (WO 94/21143).

Lazard et al (Lazard) teaches of a composition including pastry products (page 3 lines 41-45) at least partially coated with a substantially clear, i.e. invisible, coating composition (page 9 lines 19-22) comprising a modified oxidized wheat starch (page 7 lines 18-37) and a film forming agent comprising corn dextrin (page 6 line 56 through page 7 line 8 and Table III), wherein the composition provides a moisture barrier on the pastry product where applied (abstract). Lazard teaches that the coating composition is a slurry with 5-40% water and thus 60-95% solids (abstract). Lazard teaches that the

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coating composition contains 5-40% modified starch component (abstract), 0-5% stabilizers, 0-5% acids and bases, i.e. leavening agents, 0-5% flavorants (page 5 lines 11-16), and 20% corn dextrin (table XII). Lazard teaches that the coating thickness is adjust to produce the coating with the desired strength and handling characteristics (page 9 lines 8-18). Lazard teaches that the coating is thermally processed, at about 90C, to form a moisture barrier and applied to the pastry composition, which is at room temperature, i.e. about 70F (page 8 line 56 though page 9 line 2). Note: Lazard does not specifically teach of sweeteners, sodium acid pyrophosphate (SAP), and sodium bicarbonate, thus teaching of 0% sweeteners, 0% sodium acid pyrophosphate (SAP), and 0% sodium bicarbonate.

Lazard is silent to the pastry product as a toaster pastry comprising wheat flour as recited in claim 35, to the coating composition as containing about 40-60% or about 50% starch in combination with 20-40% or about 32% dextrin as recited in claims 35 and 38, to the coating composition as containing about 0.5-2.5% or about 1.8% sodium acid pyrophosphate (SAPP) and about 0.5-2.5% or about 1.2% sodium bicarbonate as recited in claims 35 and 38, to the coating composition as comprising about 10-20% or about 14% granulated sugar as recited in claims 35 and 38, to the stabilizer in the coating composition as xanthan gum as recited in claims 37, 38, and 48, to the viscosity of the coating composition as measured by the Stein viscosity method as recited in claim 41.

Tsen et al (Tsen) teaches that wheat flour based breads, baked or fired foods are staple foods in many countries because of their relatively high caloric value, ready availability of wheat flour at an economical price, and attractive organoleptic and appearance properties of the food products (Column 1 lines 20-25).

Baur et al (Baur) teaches of a barrier coating composition for food products (abstract and page 1 line 36 through line 5). Baur teaches that the coating composition contains xanthan gum in order to hydrate the starch, leading to improved product qualities as well as providing enrobing stability (page 5 lines 27-35). Baur teaches that additional leavening components contribute to the appearance, texture and keeping qualities of the final product (page 6 lines 22-28 and page 7 lines 27-36). Baur teaches

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that leavening agents and acids include about 0.1-2.5% sodium bicarbonate and about 0.1-3.5% SAPP (page 8 lines 1-13). Baur teaches of an improved crispy coating composition (abstract) comprising a unique blend of starches, dextrin, and gums (page 2 lines 8-16). Baur teaches that the starches improve the textural properties of the coating composition (page 3 lines 9-12). Baur teaches that the coating contains about 5-50% starch (Table I) and 2-20% dextrin (page 5 lines 6-16).

Regarding the pastry product as comprising wheat flour, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise particular ingredients depending on the final product desired. For example, one would have been motivated for the pastry product to comprise wheat flour in order to produce a high caloric product. It would have been further obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to comprise wheat flour since it is readily available at an economical price, and has attractive organoleptic and appearance properties when used in food products, as taught by Tsen.

Regarding the pastry product as a toaster pastry, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the pastry product to be toaster or other type depending on the final product desired. For example, one would have been motivated to use a toaster product in order to have a final product which was heated in the toaster before consumption.

Regarding the coating composition as containing about 40-60% or about 50% starch in combination with 20-40% or about 32% dextrin, it would have been obvious to adjust the level of starches and dextrin in the coating composition to 5-50% starch and 2-20% dextrin in the coating composition of Lazard in view of Baur. One would have been motivated to do so depending on the textural properties desired in the coating as taught by Baur.

Regarding the coating composition as containing about 0.5-2.5% or about 1.8% sodium acid pyrophosphate (SAP) and about 0.5-2.5% or about 1.2% sodium bicarbonate, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include about 0.1-2.5% sodium bicarbonate and about 0.1-3.5%

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SAPP in the coating composition as taught by Lazard in view of Baur. One would have been motivated to do so because Baur teaches that additional leavening components contribute to the appearance, texture and keeping qualities of the final product.

Regarding the coating composition as comprising about 10-20% or about 14% granulated sugar, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use a desired flavoring in the coating composition as taught by Lazard. One would have been motivated to use the well known flavorant, granular sugar, in the coating composition in order to impart a sweet flavor. One would have been further motivated to include an amount of sugar depending on the desired sweetness in the final product. To adjust the sweetness of a food product by adding granular sugar was well known and would be routine determination of one of ordinary skill in the art at the time the invention was made.

Regarding the 0-5% stabilizer in the coating composition of Lazard as xanthan gum, it would have been obvious to one of ordinary skill in the art at the time the invention was made for the stabilizer to be xanthan gum as taught by Baur. One would have been motivated to use xanthan gum because it is a stabilizer which better hydrated the starch in the coating composition which leads to improved product qualities in the final product, as taught by Baur.

Regarding the viscosity of the coating composition as measured by the Stein viscosity method, since the references of record teach of substantially the same coating composition as instantly claimed, one of ordinary skill in the art at the time the invention was made would expect that the coating as taught by the references of record to have substantially the same properties, including Stein viscosity, as the instantly claimed composition, absent any clear and convincing arguments and/or evidence to the contrary. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to adjust the viscosity of the coating composition so that it could be readily handled and easily applied to foods as taught by Lazard (page 3 lines 9-15).

Claims 39, 40, 42, and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lazard et al. (EP 0547551 A1) in view of the combination of Tsen et al (US 3773521) and Baur et al (WO 94/21143), further in view Fennema ed. (Food Chemistry 3rd Edition).

Lazard teaches of a composition including pastry products at least partially coated with a moisture barrier as discussed above. Lazard is silent to the oxidized modified wheat starch as substituted to a particular degree as recited in claims 39, 40, and 49.

Fennema teaches that modified starch usually has a substitution level of less than 0.1 and generally within the range of 0.002-0.2 (Page 201 Section 4.4.9 Paragraph 3). Fennema teaches that starches are modified to improve their behavioral characteristics (Page 201 Section 4.4.9 Paragraph 1).

Since, Lazard teaches of a modified starch but does not teach of the substitution level of the starch, one of ordinary skill in the art would have been motivated to look to the food art, such as Fennema, to find the starch substitution level. One would have been motivated to use starch with a substitution level of 0.002-0.2 as taught by Fennema since it was commonly utilized in foods and would be readily available.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir.

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1985); In re Van Ornum, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and In re Thorington, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-23 and 35-49 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 5-9, 11, 14, 15, and 17-19 of copending Application No. 10682673 (673). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 1-23 and 35-49 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 2, 6-8, 12-17, 23-28, and 47-53 of copending Application No. 10682672 (672). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Response to Arguments

Applicant's arguments with respect to the 103(a) rejections have been considered but are moot in view of the new ground(s) of rejection.

Applicant's arguments regarding the provisional nonstatutory type double patenting rejection over US patent applications 10/682672 and 10/682673 have been fully considered but they are not persuasive. Applicant argues (remarks page 11) that, when "the provisional nonstatutory obvious-type double patenting rejection is the only rejection remaining... the examiner should withdrawn the rejection". Applicant's argument is not convincing as the provisional nonstatutory obvious-type double patenting rejection is not the only remaining rejection.

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Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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/Lien Tran/
Primary Examiner
Art Unit 1794

/Kelly Bekker/
Examiner
Art Unit 1794